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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CHAYNE EDWIN IRVIN, **Petitioner,** **v.** **THE SUPERIOR COURT OF HUMBOLDT COUNTY,** **Respondent;** **THE PEOPLE,** **Real Party in Interest.**	**A104743** **(Humboldt County Super. Ct. No. CV000501)**

THE COURT:*****

Petitioner Chayne Edwin Irvin sought habeas relief in the superior court on July 14, 2000. Over a year later, on August 7, 2001, the superior court issued an order "find[ing] that petitioner ha[d] met his initial burden of pleading sufficient grounds for relief," and directing that a writ of habeas corpus issue. The next day, the superior court issued the writ of habeas corpus, commanding the People "to show cause for the continuance of legal restraints upon" petitioner, and further directing that "[p]etitioner shall remain in the custody of the Department of Corrections at his present location while

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***** Before Stevens, Acting P.J., Simons, J., and Gemello, J.

the Court obtains and considers a response from respondent," citing *People v. Romero* (1994) 8 Cal.4th 728, 738 (*Romero*).

The district attorney filed a response to the petition, and although petitioner was afforded the opportunity to file a traverse, he did not do so. On November 30, 2001, the superior court denied petitioner's habeas petition, concluding that an evidentiary hearing was unnecessary because "consideration of the written return and matters of record persuade[d] the court the contentions in the petition lack[ed] merit" for reasons expressed in the court's denial order.

It is undisputed that the superior court never appointed counsel to represent petitioner in the habeas proceedings below.

The Supreme Court has held that once an order to show cause issues in a habeas proceeding, indicating that petitioner has made a prima facie showing of entitlement to relief, due process requires the appointment of counsel. (*In re Sanders* (1999) 21 Cal.4th 697, 717, fn. 11 (*Sanders*).) Issuance of an order to show cause is procedurally akin to issuance of a writ of habeas corpus, which is the procedure the superior court followed here. (*Romero, supra,* 8 Cal.4th at p. 738.)[1] The superior court's order commanding

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[1] "The role that the writ of habeas corpus plays is largely procedural. It 'does not decide the issues and cannot itself require the final release of the petitioner.' [Citation.] Rather, the writ commands the person having custody of the petitioner to bring the petitioner [footnote] 'before the court or judge before whom the writ is returnable' [citation], except under specified conditions [citation], and to submit a written return justifying the petitioner's imprisonment or other restraint on the petitioner's liberty [citation]. [¶] Judicial practice and decisions of this court have authorized one deviation from the procedure specified in the Penal Code. Because 'appellate courts are not equipped to have prisoners brought before them . . . this court and the Courts of Appeal developed the practice of ordering the custodian to show cause why the relief sought should not be granted.' [Citations.] When used as a substitute for the writ of habeas corpus, the order to show cause 'directs the respondent custodian to serve and file a written return.' [Citation.] Many superior courts have likewise adopted the practice of issuing an order to show cause in place of the writ of habeas corpus when a habeas corpus petition states a prima facie case for relief. [Citations and footnote.]" (*Romero, supra,* 8 Cal.4th at p. 738.)

issuance of the writ plainly concluded that petitioner had stated a prima facie case for relief. Consequently, the superior court should have appointed counsel for petitioner, both under the authority of *Sanders, supra,* at page 717, footnote 11, and California Rules of Court, rule 4.551(c)(2), which provides that "[u]pon issuing an order to show cause, the court must appoint counsel for any unrepresented petitioners who desire but cannot afford counsel."

Petitioner objects to this due process violation in the petition for writ of habeas corpus presently before us. The People have conceded that respondent superior court erred in failing to appoint counsel for petitioner after issuing orders which were functionally equivalent to an order to show cause.

The People suggest that we should invoke laches to deny petitioner relief, in light of petitioner's 21-month delay in filing his petition in this court. However, having reviewed petitioner's filings, we conclude that petitioner has not unreasonably delayed seeking relief from this court. (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 163.)

The petition for writ of habeas corpus is deemed a petition for writ of mandate. We previously advised the parties that we might issue a peremptory writ in the first instance. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-180.) Petitioner's right to relief is obvious, and no useful purpose would be served by issuance of an alternative writ, further briefing and oral argument. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241.)

Therefore, let a peremptory writ of mandate issue compelling respondent superior court to (1) vacate its decision denying the petition for writ of habeas corpus, (2) appoint counsel for petitioner, (3) thereafter allow the filing of a traverse, and (4) reconsider the merits of the habeas petition, including the question of whether an evidentiary hearing is required. In all other respects, the petition is denied. This decision shall be final as to this court within 10 days. (Cal. Rules of Court, rule 24(b)(3).)